IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1149

LOUIS EPSTEIN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

CITATIONS

Cases:

Statutes:

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Louis Epstein respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered on the 26th day of March, 1946 (R. 494), which affirmed the judgment of the United States District Court for the Southern District of New York, entered on the 29th day of December, 1944 (R. 463), convicting the petitioner of using the mails in violation of Section 215 of the Criminal Code, 18 U. S. C. A. § 338 (R. 2, *et seq.*).

The indictment named the petitioner and three others, namely: Wilfred E. Cohen, Harry Sussman and Sam Elkin (R. 2). Cohen and Sussman pleaded guilty to the indictment.

Elkin was tried separately, convicted and died before sentence.

The petitioner was tried before Hon. Mortimer W. Byers, without a jury (R. 17). He was sentenced to prison for a year and a day (R. 463).

Opinion Below

The opinion of the District Court is not reported; it appears at page 439 of the Record. The opinion of the Circuit Court of Appeals is not yet reported; it is reported at page 483 of the Record.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on March 26, 1946. Jurisdiction to issue the writ is found in the provisions of Section 240(a) of the Judicial Code, as amended, by the Act of February 13, 1925; 28 U. S. C. A. § 347(a), as modified pursuant to Act of March 8, 1934, 18 U. S. C. A. § 688, by Rule 11, of Rules of Criminal Procedure after plea of guilty, verdict or finding of guilt.

Questions Presented

1. Whether there is evidence to sustain the petitioner's conviction of using the mails in violation of § 215 of the Criminal Code; 18 U. S. C. A. § 338.

2. Whether the undisputed and uncontradicted evidence does not establish that the letters were mailed in furtherance and in execution of a scheme to defraud, of which the petitioner had no knowledge and to which he was not a party.

Statutes Involved

Section 215 of the Criminal Code, 18 U. S. C. A. § 338 is set forth in the appendix to this petition.

Statement

There were two separate, distinct and independent schemes. The participants in one were the petitioner, Cohen and Sussman. The indictment does not charge that the mails were used in execution and furtherance of that scheme.

The participants in the other scheme were Cohen and Elkin. The mails were used in execution and furtherance of that scheme. Epstein, the petitioner, had neither knowledge of that scheme, nor of the letters sent in furtherance thereof. The letters were sent on stolen letterheads of the Treasury Department; were mailed in official envelopes of the Treasury Department, which were also stolen; and bore the forged signature of a Treasury Department official.

The Epstein, Sussman and Cohen Scheme:

The petitioner was a substantial businessman with a good reputation (R. 322). He was in the hotel business in New York City and was successful (R. 267). He had at the request of Harry Sussman, an acquaintance of many years (R. 270), made advances to Wilfred E. Cohen whom he had not yet met, upon post-dated checks (R. 18-19). For those advances he received a fee of 1% a day; the total advances amounted to $10,000 and covered a period of two months prior to the meeting with Cohen on or about January 1, 1942 (R. 20-21).

Wilfred E. Cohen had been in the interior decorating business from 1932 through 1940 (R. 15-16). In 1928 he had pleaded guilty to forgery (R. 15), but the record does not show whether the petitioner knew it. In November, 1940 he organized Spotlight Productions, Inc. (R. 16) in which he had invested $50,000 (R. 208). The Corporation engaged in the manufacture of coin-operated

motion picture projection machines (R. 16-17), and in the production of short movies for use with those machines (R. 208).

At or about January 1, 1942, Epstein met Cohen; the meeting had been arranged by Sussman and he was present (R. 18; 23; 210). The meeting was held at the offices of Spotlight Productions, Inc. at 723 Seventh Avenue, New York City (R. 17-18). Spotlight occupied the whole top floor of the building. There was a projection room, a private office and two other rooms, all well furnished (R. 213). Cohen told the petitioner that he had the factory at 313 East 22nd Street, also in New York City (R. 214). One of the projection machines was on display and Cohen showed him how it worked and demonstrated it by running off some short movies lasting about an hour (R. 22). He told Epstein that he had sold a number of the machines; that he was compelled to take some back because of certain defects and that he was working on a new type of machine which would cure the defects (R. 22; 213-214). He also told Epstein that he had, at the factory, two hundred completed machines selling for $685 each and about one hundred machines in process worth about $150 each (R. 214), or a total of about $152,000.

Sussman had been lending money to Cohen and the meeting at Cohen's office had been arranged by Sussman in order to induce Epstein to make a loan of about $10,000 to Cohen (R. 212).

Epstein, Sussman and Cohen met again on January 20th at the new Union Square Hotel, also in New York City. That meeting also was arranged by Sussman (R. 23) and prior to the meeting, Epstein had agreed to make four notes aggregating $11,700. The notes were made payable to the order of Sussman and Sussman endorsed

them and delivered them to Cohen (R. 23; Ex. 4, R. 470). For the making of the notes, and for endorsing them, Epstein and Sussman each received about $400 (R. 27). It was understood that Cohen would discount those notes with money lenders and Epstein and Sussman both agreed that they would, if asked, state that the notes were issued, in payment for machines and that they would if requested sign estoppel certificates to that effect (R. 25).

At this meeting of January 20, Epstein demanded security for the notes and there was issued to him a conditional bill of sale. Epstein, however, made it clear that in making the notes, he relied mainly upon the guaranty of Harry Sussman (R. 23, 216, 217, 220).

Two of the notes which were issued on January 20th matured on April 20th and two on May 20th (R. 28). The notes which became due on April 20th were paid with funds furnished by Cohen (R. 29). On May 15th, five days before the other two notes became due, the petitioner, Cohen and Sussman met again; that meeting also was arranged by Sussman. Prior to the meeting Epstein had agreed, apparently at the request of Sussman, to issue new notes which would be discounted, and with the proceeds the May 20th notes would be paid (R. 30). Thereafter from time to time Epstein issued more notes and signed more estoppel certificates. The notes and the estoppel certificates were delivered to various money lenders, who discounted the notes. For making the notes, Epstein received a fee. He did not share in the proceeds.

Sussman had been cashing post-dated checks for Cohen and there came a time when the bank upon which Cohen's check had been drawn objected to this check "kiting" (R. 78-79). For a fee Epstein agreed to "kite" checks with Cohen. Some of the checks issued by Epstein were

cashed with money lenders; the remainder were cashed with Grand Central Trading Company (R. 79), which was owned and operated by Sussman (R. 78). Of course Sussman participated in this arrangement.

This issuing of checks and notes continued from January, 1942 through the greater part of 1943. Until September, 1943, for a year and a half, Cohen paid every note and check that had matured (R. 176, 244, 247).

In October, 1943, the triumvirate found themselves in financial difficulties and Sussman and Epstein agreed that they would each advance $10,000 (R. 199). Epstein advanced his $10,000, but Sussman did not and in fact never intended to do so (R. 199, 252-3). In November, Epstein and Sussman each agreed to advance an additional $7,000 (R. 200-201). Epstein had been told by Cohen and Sussman that Sussman had advanced the $7,000 which he had promised to advance in October. Believing the representations and relying upon the promise of Sussman that he would advance an additional $7,000, Epstein advanced $7,000 to Cohen. Sussman never did and never intended to do so (R. 253-257).

The total fees received by Epstein for notes and checks issued by him was $24,000 (R. 242-243). The $17,000 which he had advanced was never repaid to him and later he made a settlement with his creditors for $15,000 (R. 268). The net result of these transactions was a loss of some $7,000 to Epstein.

The indictment (R. 2, *et seq.*) does not charge that the mails were used in furtherance of or in execution of the sale or discounting of any notes or checks made, signed or endorsed by the petitioner Epstein.

The Cohen-Elkin Scheme:

Even prior to his meeting with Epstein, Cohen had been selling his own and Sussman's checks to Lectern Service, a corporation engaged in the money lending business (R. 72-73). Lectern bought some of Epstein's notes from Cohen and in connection with these transactions Cohen met the defendant Sam Elkin (R. 74), Lectern's manager (R. 319).

Elkin and Cohen devised the second scheme; in fact Elkin originated it (R. 155).

That scheme was practised upon two money lenders; Lectern Service, the firm of which Elkin was manager, and Accurate Factors. Lectern had refused to accept any more Epstein notes (R. 415) and Accurate had limited the amount of Epstein notes which it would at any one time discount, to $5,000 (R. 372).

It was because Lectern and Accurate would not accept Epstein notes that this Cohen-Elkin scheme was devised. It was in furtherance of that scheme that the mails were used.

The first victim of this Cohen-Elkin scheme was Elkin's firm Lectern Service, Inc. In November, 1942, Elkin introduced Cohen to Morris Popkin who had just become associated with the firm as treasurer (R. 329). Cohen stated to Popkin that he had leased a number of motion picture projection machines to the Treasury Department for use in connection with the sale of war stamps and war bonds; that payment was not expected for some time; and that he needed money for his business and asked for an advance against the alleged Government debt (R. 413-415, 416).

Popkin wanted proof. And Cohen, with the aid and assistance of Elkin, furnished it.

In some way which the record does not explain, Cohen had procured some official letterheads and envelopes of the Treasury Department. And Elkin and he—in fact it was Elkin—composed a letter and sent it by mail on the official letterhead of the Treasury Department in a franked envelope of the Treasury Department bearing the forged signature of a Treasury official (R. 155). This spurious forged letter confirmed the lease and acknowledged the indebtedness to Cohen, and in reliance thereon, Lectern made the first advance to Cohen in December, 1942 (R. 155, 417). The advance was made upon the note of Spotlight Productions, Inc., endorsed by Cohen, and secured by an assignment of the alleged debt due from the Government (R. 154, 156).

A number of such advances were made by Lectern Service to Cohen upon the notes of Spotlight Productions, Inc., endorsed by Cohen and secured by an assignment of the alleged monies due from the Government, from December, 1942 through the greater part of 1943. The letters were addressed to Spotlight Productions, Inc., 277 Broadway, the address of Lectern Service (R. 417; Exs. 36, 37, R. 474). And each advance was made in reliance upon letters sent on stolen letterheads and in stolen envelopes of the Treasury Department bearing the forged signature of a Treasury official.

The first transaction with Accurate Factors relating to alleged Treasury obligations occurred in February, 1943 (Ex. 31, R. 457). Cohen also told Accurate that he had leased a number of machines to the Treasury Department for use in connection with the sale of war stamps and war bonds and upon request for proof of such transactions, furnished it by mailing letters on stolen official Treasury letterheads, enclosed in stolen franked official envelopes and bearing the forged signature of a Treasury official. Just as in the case of Lectern, Accurate

made the advances on the notes of Spotlight Productions, Inc., endorsed by Cohen and "nobody else" (R. 377) and secured by an assignment of this supposed Government debt (R. 376-378).

From February, 1943, through August, 1943, Accurate advanced upon the notes of Spotlight, endorsed by Cohen and secured by assignments $162,000, of which only $70,000 was repaid (R. 389; Exs. 31, 32, 33, 34, 35; R. 457-461).

And the undisputed and uncontradicted testimony was that Epstein was never told and never knew about this Cohen-Elkin Treasury scheme.

In summarizing that testimony, the District Court said (R. 430):

> "The Court: The testimony of Cohen is that he never discussed Treasury income with Epstein in any way, I was rather careful to note. * * *"

Epstein did not know Elkin; they had never met (R. 280-281).

Specifications of Error

The Court below erred:

1. In holding that the petitioner used the mails to defraud in violation of Section 215 of the Criminal Code, 18 U. S. C. A. Section 338.

2. In failing to hold that the letters set forth in the indictment were used to further and execute an entirely separate distinct and independent scheme with which the petitioner was not connected and to which he was not a party.

3. In affirming the judgment of conviction of the District Court.

Reasons for Granting the Writ

The petitioner was convicted of using the mails to defraud in violation of Section 215 of the Criminal Code, 18 U. S. C. A. 338 upon evidence which clearly establishes that no such use of the mails was made.

In *Kann* v. *United States,* 323 U. S. 88, this Court said at page 95, "* * * The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."

The letters which were mailed as charged in the indictment, were used in furtherance of and in execution of a separate, distinct and independent scheme with which the petitioner was not connected, of which he had no knowledge, and to which he was not a party. In describing the scheme to which the petitioner was a party, the Circuit Court of Appeals in part said as follows (R. 485):

> "In detail, the scheme called for defendant Epstein to make promissory notes to Sussman, which were then to be endorsed to Cohen and by the latter discounted with various factors throughout the city. To induce such discounting, Cohen was to represent that the notes were received for the purchase price of machines bought from Spotlight by Epstein and Sussman, who agreed to corroborate the story if questioned and to execute the notes and supporting documents, receiving, in turn, a consideration of $400 for each $10,000 of notes issued. * * *"

One of the purposes of the petitioner in entering into this scheme was to make a profit. He derived no profit

whatever from the notes which were discounted in reliance upon the suppositious Treasury debt. It was because Lectern Service and Accurate Factors refused to discount notes of the petitioner that the new scheme was devised by Cohen and Elkin. The new scheme had for its purpose not the discount of paper to which the petitioner was a party, but the discount of paper to which he was not a party and from which he derived no profit. The petitioner was not a confederate to this new scheme. *United States* v. *Cohen,* 145 F. (2d) 82, (2 C. C. A., 1944); *United States* v. *Crimmins,* 123 F. (2d) 271 (2 C. C. A. 1941).

If the letters, which were sent on stolen Treasury letterheads in stolen official envelopes, signed with the forged signature of a Treasury official, are within the scope of the scheme devised by Cohen, Sussman and Epstein for the sale and discount of notes and checks made or endorsed by Epstein, then the theft of the letterheads and the envelopes and the commission of forgery must also be held within the scope of that scheme and the petitioner was guilty not only of using the mails to defraud, but he was guilty also of larceny in violation of Section 35C of the Criminal Code, 18 U. S. C. A. 82; of using franked envelopes in violation of Section 227 of the criminal Code, 18 U. S. C. A. 357; and of forgery. *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229; *Van Riper* v. *United States,* 13 F. (2d) 961, 967 (2 C. C. A., 1926); *Morei* v. *United States,* 127 F. (2d) 827 (6 C. C. A., 1942).

Surely it was never within the contemplation of Epstein when he became a party to the scheme to issue his notes and checks for discount with money lenders, that Cohen in collusion and conspiracy with Elkin, a third person unknown to him, would steal and use official sta-

tionery and envelopes of the Treasury Department and forge the signature of a Treasury Department official.

The petitioner was not guilty of any offense cognizable under the laws of the United States.

CONCLUSION

Wherefore, it is respectfully submitted that, for the reasons herein stated, a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit should be granted.

Dated: New York, April 18, 1946.

Louis Epstein,

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Hyman Grill,
of Counsel.